89-162

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1988

STANLEY EXNER,

PETITIONER

v.

LOUIS W. SULLIVAN,
Successor in Office to
OTIS R. BOWEN, Secretary
of Health and Human Services,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JAMES J. WALL
Legal Services of the Lower Cape Fear, Inc.
106 Market Street
Post Office Box 814
Wilmington, North Carolina 28402-0814
(919) 763-6207

COUNSEL OF RECORD

QUESTIONS PRESENTED

I. MAY A FEDERAL COURT AFFIRM A DECISION OF THE SECRETARY OF HEALTH AND HUMAN SERVICES DENYING WAIVER OF RECOUPMENT OF AN OVERPAYMENT OF SUPPLEMENTAL SECURITY INCOME BENEFITS BASED UPON AN ADVERSE CREDIBILITY DETERMINATION WHEN THE SECRETARY OF HEALTH AND HUMAN SERVICES HAS NEVER MADE ANY ADVERSE CREDIBILITY DETERMINATION?

II. IN ORDER TO WARRANT DEFAULT JUDGMENT AGAINST THE UNITED STATES AS A SANCTION FOR FAILURE TO OBEY COURT SCHEDULING ORDERS, MUST A PLAINTIFF HAVE AN UNCONTROVERTED CLAIM FOR RELIEF?

TABLE OF CONTENTS

PAGE

OPINIONS BELOW..... 2

JURISDICTION..... 3

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED..... 4

STATEMENT OF THE CASE..... 5

A. The Facts..... 5

B. Administrative Proceedings.. 9

C. Proceedings in the District Court..... 12

D. Proceedings in the United States Court of Appeals for the Fourth Circuit..... 13

JURISDICTION IN THE COURT OF FIRST INSTANCE..... 14

REASONS FOR GRANTING THE WRIT..... 15

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN THE PRESENT CASE UPON THE ISSUE OF AN ADVERSE CREDIBILITY FINDING CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT..... 15

II. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN THE PRESENT CASE CONFLICTS WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS..... 25

III. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS SO FAR SANCTIONED A DEPARTURE BY A LOWER COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION..... 31

IV. THERE IS A DIRECT CONFLICT BETWEEN THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN THE PRESENT CASE UPON THE ISSUE OF THE LEGAL STANDARD TO DETERMINE DEFAULT JUDGMENT AGAINST THE UNITED STATES AND A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT..... 38

CONCLUSION..... 50

TABLE OF AUTHORITIES

CASES PAGE

Alameda v. Secretary of HEW,
622 F.2d 1044..... 39, 40, 41, 42

Albemarle Paper Co. v. Moody,
422 U.S. 405..... 43, 44

Arnold v. Secretary of HEW,
567 F.2d 258..... 32

Atchison, Topeka, & Sante Fe
Railway Co. v. U.S.,
295 U.S. 193..... 18

Baerga v. Richardson,
500 F.2d 309..... 29

Burlington Truck Lines v. U.S.,
371 U.S. 156..... 17, 18

Califano v. Yamasaki,
442 U.S. 682..... 19, 20, 21, 23

Collins v. Seaboard Coastline
Railroad, 681 F.2d 1333..... 44

Cook v. Heckler,
783 F.2d 1168..... 32

Cotter v. Harris,
642 F.2d 700..... 28

Doe v. Charleston Area Medical
Center, 529 F.2d 638..... 33

CASES (CONT'D)

Donato v. Secretary of HHS,
721 F.2d 414..... 28

Dundee Cement Co. v. Howard Pipe
and Concrete Products, Inc.,
722 F.2d 1319..... 43

Gaimer v. Secretary of HHS,
815 F.2d 1275..... 28

Garfield v. Schweiker,
732 F.2d 605..... 29

Giampaoli v. Califano,
628 F.2d 1190..... 42

Gordon v. Schweiker,
727 F.2d 231..... 32

Hammond v. Heckler,
765 F.2d 424..... 33

Herbert v. Heckler,
783 F.2d 128..... 29

Huston v. Bowen,
838 F.2d 1125..... 29

Johnson v. Heckler,
767 F.2d 180..... 29

MacGregor v. Bowen,
786 F.2d 1050..... 27

Marziliano v. Heckler,
728 F.2d 151..... 42

CASES (CONT'D)

Maxey v. Califano,
598 F.2d 874..... 32

Mitchell v. W.T. Grant Co.,
416 U.S. 600..... 20

Motor Vehicle Manufacturers
Assoc. v. State Farm Mutual
Automobile Ins. Co.,
463 U.S. 29..... 18, 19

Poe v. Mathews,
572 F.2d 137..... 47

Richardson v. Perales,
402 U.S. 389..... 16

Schweiker v. Chilicky,
487 U.S. ___..... 37, 38

Schwingel v. Harris,
631 F.2d 192..... 25

Shelman v. Heckler,
821 F.2d 316..... 29

Small v. Califano,
565 F.2d 797..... 28

Smith v. Califano,
592 F.2d 1235..... 32

Smith v. Heckler,
782 F.2d 1176..... 32

Thorne v. Weinberger,
530 F.2d 580..... 32

CASES (CONT'D)

United States v. Burr,
25 F.Cas. 30..... 44

Varney v. Secretary of HHS,
859 F.2d 1396..... 27

Viehman v. Schweiker,
679 F.2d 223..... 26, 27

REGULATIONS

20 C.F.R. § 404.507..... 20

20 C.F.R. § 404.510..... 4

20 C.F.R. § 416.552..... 4, 22

20 C.F.R. § 416.553..... 4, 22

20 C.F.R. § 416.554..... 4, 22

STATUTES

5 U.S.C. § 1007..... 16

28 U.S.C. § 1254..... 4

42 U.S.C. § 404..... 4, 19

42 U.S.C. § 405... 4, 12, 14, 16, 36

42 U.S.C. § 1383..... 4, 19

MISCELLANEOUS

Rule 55, Federal Rules of Civil Procedure..... 4, 43, 45, 46, 47

Wright, Miller & Cooper, Federal Practice and Procedure, § 2702..... 43

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1988

NO. _____

STANLEY EXNER,

PETITIONER

v.

LOUIS W. SULLIVAN,
Successor in Office to
OTIS R. BOWEN, Secretary
of Health and Human Services,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

The petitioner, Stanley Exner, respectfully prays that the Supreme Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the

Fourth Circuit entered in the above-entitled proceeding on December 15, 1988. A petition for rehearing and suggestion for rehearing en banc was denied by an Order of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled proceeding on March 29, 1989.

OPINIONS BELOW

The December 15, 1988 opinion of the United States Court of Appeals for the Fourth Circuit is unpublished and is reprinted in the Appendix hereto, p. A-4 (hereinafter "App."). The March 29, 1989 Order of the United States Court of Appeals for the Fourth Circuit denying rehearing and rehearing en banc is reprinted, App. A-31.

The Order of the United States District Court for the Eastern District of North Carolina, entered January 7, 1988 and filed January 8, 1988 affirming the decision of the Administrative Law Judge (hereinafter ALJ), is reprinted at App. A-7. The Order of the United States District Court for the Eastern District of North Carolina entered December 3, 1987 and filed December 7, 1987 denying default judgment, is reprinted at App. A-14.

The final decision of the Secretary of Health and Human Services entered November 22, 1985, denying waiver of recoupment of overpayment, is reprinted at App. A-19.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the

Fourth Circuit was issued on December 15, 1988. The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Fourth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following provisions of the Social Security Act: 42 U.S.C. § 404(b), 42 U.S.C. § 405(b)(1), 42 U.S.C. § 405(g), and 42 U.S.C. § 1383(b)(1). This case also involves the following regulations of the Secretary of Health and Human Services: 20 C.F.R. § 416.552, 20 C.F.R. § 416.553, 20 C.F.R. § 416.554, 20 C.F.R. § 404.510a. In addition, this case involves Rule 55 of the Federal Rules of Civil Procedure.

The provisions of the above statutes, federal regulations, and federal rules of civil procedure, are set out in the Appendix hereto, App. A-249-262.

STATEMENT OF THE CASE

A. The Facts

On June 7, 1979, Stanley A. Exner applied for Supplemental Security Income (hereinafter SSI) disability benefits on behalf of his eight-year-old child, Anthony Exner, who is severely handicapped as a result of cerebral palsy and epilepsy, and requires extensive and expensive medical care and treatment. When Mr. Exner went to the Social Security office to apply for disability benefits for his son, a representative of the Social Security

Administration (hereinafter SSA) filled out an application and Statement of Income and Resources which Mr. Exner signed. App. A-105-128.

At the time he applied for SSI, Mr. Exner was not employed. Mr. Exner told the Social Security representative that he had been hired for a civil service job at Camp LeJeune, App. A-49-79, and that he would begin work in approximately one month with a starting salary of $13,100 per year. App. A-77. The Social Security representative, who conducted the interview and filled out the application for Mr. Exner, did not record this information on the application.

When Mr. Exner told the Social Security representative that he had obtained employment, the amount of his

salary, and when he would be starting work, the Social Security representative indicated to Mr. Exner that that was okay. App. A-77. The Social Security representative further told Mr. Exner that he would receive a package around October of the following year and would have to fill it out to determine if his son was still eligible for SSI at that time. The Social Security representative seemed to accept Mr. Exner's statement about his employment at Camp LeJeune merely by saying that such employment was "okay". App. A-77-79. From this, Mr. Exner understood the Social Security representative to discount the issue of Mr. Exner's employment and indicate that employment was alright so far as SSI benefits for his son was concerned. These statements

by the Social Security representative, taken together, indicated to Mr. Exner that he need not report anything further to SSA until October 1980.

On August 8, 1979, approximately two months after Mr. Exner applied for SSI and informed the Social Security representative of his upcoming job and amount of his salary, SSA sent Mr. Exner a supplemental security income payment decision, which, along with other information near the bottom of the page, required notification of changes in income for Anthony Exner or members of his household. Mr. Exner did not immediately notify Social Security, after receiving this notice, that he in fact had begun work.

During the period of time when Mr. Exner received the August 8, 1979 payment decision, he was going through the breakup of his marriage as well as severe emotional problems occasioned by his son's condition. Mr. Exner did not recall seeing the payment decision at the time but later found the document among his important papers. App. A-62-67.

During this period of time, Mr. Exner's living expenses for himself and his family were greater than his total income, and he could not afford to repay the SSI overpayment. App. A-169.

B. Administrative Proceedings

Mr. Exner applied for a waiver of recoupment of overpayment benefits. After denial, Mr. Exner requested and obtained a hearing before an Administra-

tive Law Judge (hereinafter ALJ). At hearing, Mr. Exner testified to the facts as hereinbefore summarized.

A hearing was held on November 7, 1985 and the ALJ rendered the decision on November 22, 1985. App. A-19. In his decision, the ALJ determined that Mr. Exner was not without fault because he failed to furnish relevant information about his employment to the Social Security Administration (hereinafter SSA) after he received the notice of August 8, 1979. The decision of the ALJ does not assess Mr. Exner's credibility, and in fact does not even mention credibility or indicate in any what that the ALJ did not find Mr. Exner to be a credible witness. App. A-21-30. The ALJ also failed to consider whether Mr. Exner's notification of the Social

Security representative on June 7, 1979, that Mr. Exner had obtained employment in the amount of compensation expected, met the requirement of the Social Security regulations which require Mr. Exner to furnish relevant information. The ALJ also did not consider Mr. Exner's reliance upon information received from an official source in SSA, the Social Security representative who took his application, nor did he evaluate Mr. Exner's relevant mental and emotional state in determining whether or not Mr. Exner was without fault. App. A-21-30. The ALJ, in his decision, relied exclusively on the notice of August 8, 1979, in Mr. Exner's failure to immediately notify the agency thereafter that he had become employed. App. A-28.

The Appeals Council affirmed the ALJ's decision, thus making it the final decision of the Secretary.

C. Proceedings in the District Court

Mr. Exner commenced the present action to obtain judicial review of a final decision of the Secretary, invoking jurisdiction of the United States District Court for the Eastern District of North Carolina pursuant to 42 U.S.C. § 405(g). Mr. Exner called to the Court's attention, in his motion for summary judgment, the failure of the Secretary to make findings regarding Mr. Exner's credibility. In addition, Mr. Exner, through counsel, asserted that he had properly notified SSA of his employment by the information he provided on June 7, 1979 when he applied for benefits; that he relied upon erroneous

information from an official source within SSA; and that the Secretary failed to properly assess his mental capacity. App. A-206-220.

After filing his motion for summary judgment, the Secretary failed to comply with court scheduling orders for a response, and Mr. Exner's counsel moved the entry of default and default judgment as a sanction. App. A-179. This motion was denied by the district court, App. A-14-18, and the district court affirmed the decision of the Secretary holding that an adverse credibility determination had been made by the Secretary. App. A-7-13.

D. Proceedings in the United States Court of Appeals for the Fourth Circuit

Mr. Exner appealed the decision of the district court and pointed out to

the United States Court of Appeals for the Fourth Circuit, all of the above issues and specifically pointed out that the district court's decision was in error because the Secretary of Health and Human Services had never made any credibility determination with respect to Mr. Exner's credibility. App. A-221-248. Nonetheless, the United States Court of Appeals for the Fourth Circuit affirmed summarily, adopting the reasoning of the district court, App. A-4-6, and denied a petition for rehearing and rehearing en banc. App. A-31.

Jurisdiction in the Court of First Instance

The United States District Court for the Eastern District of North Carolina had federal jurisdiction over the present case as the court of first instance pursuant to 42 U.S.C. § 405(g).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN THE PRESENT CASE UPON THE ISSUE OF AN ADVERSE CREDIBILITY FINDING CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The Court of Appeals in the present case adopted the reasoning of the United States District Court upon the issue of credibility findings. App. A-4-6. The district court, in its order of January 8, 1988, indicates that the ALJ determined the issue of credibility against Mr. Exner. App. A-12. In fact, no such determination was made in the ALJ's decision. App. A-21-30. In fact, the ALJ nowhere in his decision ever discusses credibility nor even points to any evidence in the record which brings Mr. Exner's credibility into question. A fair reading of the ALJ's decision would appear to indicate that, if

anything, he at least by implication accepted Mr. Exner's testimony as true. App. A-21-30. The district court was correct when it stated, App. A-12, that credibility decisions are functions of the Secretary, not the courts; citing Richardson v. Perales, 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971).

Decisions of this Court interpreting relevant provisions of the Administrative Procedure Act, 5 U.S.C. § 1007(b), are relevant and should be considered in the present case in interpreting the requirements of the Social Security Act, 42 U.S.C. § 405(b), that the Secretary of Health and Human Services make the findings. As this Court pointed out in Richardson v. Perales, 402 U.S. at 409, 28 L.Ed.2d at 857, Social Security administrative

procedure does not vary from that described in the Administrative Procedures Act; for the Administrative Procedures Act is modeled upon the Social Security Act.

In Burlington Truck Lines v. U.S., 371 U.S. 156, 82 S.Ct. 239, 9 L.Ed.2d 207 (1962), there were no findings, and no analyses to justify the administrative choices made. Mr. Justice White, writing for the court in Burlington Truck Lines v. U.S., 371 U.S. at 167, 9 L.Ed.2d at 215, states:

> We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice. (citation omitted). Expert discretion is the lifeblood of the administrative process, but "unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its

discretion." (citation omitted) (emphasis in original)

Burlington Truck Lines v. U.S., 371 U.S. at 168, 9 L.Ed.2d at 216, goes on to require that the agency must make findings that support its decision, and those findings must be supported by substantial evidence.

In the absence of a finding as to essential facts, the order of an administrative agency cannot be sustained. Atchison, Topeka, & Santa Fe Railway Co. v. U.S., 295 U.S. 193, 55 S.Ct. 748, 79 L.Ed. 1382 (1935). An agency must examine relevant data and articulate a satisfactory explanation for its actions, including a rational connection between the facts found and the choices made even where the scope of review is the arbitrary and capricious standard. Motor Vehicle Manufacturers

Assoc. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

42 U.S.C. § 1383(b)(1) provides for a waiver of overpayment to an individual who was without fault in connection with the overpayment if adjustment or recovery of the overpayment would defeat the purposes of the Social Security Act, or be against equity and good conscience, or impede the efficient and effective administration of the Social Security Act.

This provision is essentially identical to the provisions of 42 U.S.C. § 404(b) regarding waiver of overpayment of social security, as opposed to SSI, benefits. In Califano v. Yamasaki, 442 U.S. 682, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979), the Court pointed out that

written review hardly seems sufficient to discharge the Secretary's statutory duty to make an accurate determination of waiver under § 204(b) of the Social Security Act, 42 U.S.C. § 404(b). The court in Califano v. Yamasaki went on to say:

> Under that subsection, the Secretary must assess the absence of "fault" and determine whether or not recoupment would be "against equity and good conscience"....The Court previously has noted that a "broad 'fault' standard is inherently subject to factual determination and adversarial input." Mitchell v. W.T. Grant Co., 416 U.S. 600, 617, 40 L.Ed.2d 406, 94 S.Ct. 1895 (1974). As the Secretary's regulations make clear, "fault" depends on an evaluation of "all pertinent circumstances" including the recipient's "intelligence...and physical and mental condition" as well as his good faith. 20 C.F.R. § 404.507 (1978). We do not see how these can be evaluated absent personal contact between the recipient and the person

> who decides his case. Evaluating fault, like judging detrimental reliance, usually requires an assessment of the recipient's credibility, and written submissions are a particularly inappropriate way to distinguish a genuine hard luck story from a fabricated tall tale. (citation omitted). 442 U.S. at 696, 697, 61 L.Ed.2d at 189, 190.

It is clear from Califano v. Yamasaki that credibility will frequently be a crucial question in waiver of recoupment of overpayment cases such as the present case. In the present case, if credibility is determined in favor of Mr. Exner, waiver of overpayment is appropriate. Mr. Exner's testimony indicates he notified the Secretary on June 7, 1979 of the date he would be starting work and the salary he would make. He has argued both to the district court and the Court of Appeals that such notification is sufficient to

meet the requirements of the Act and the Secretary's regulations including 20 C.F.R. § 416.552, Waiver or adjustment of recovery--without fault.

Likewise, Mr. Exner's testimony and written submissions as to his income show that waiver is appropriate under 20 C.F.R. § 416.553 which defines "defeat the purposes of the Supplemental Security Income program" and 20 C.F.R. § 416.554 which defines "against equity and good conscience."

Mr. Exner's testimony as to his reliance upon information from an official source within the SSA that Mr. Exner need do nothing further until October of the following year, if believed, also provides him with a valid defense. A recipient who justifiably relies on erroneous information from an

official source within the SSA is without fault. Califano v. Yamasaki, 442 U.S. at 685, 686, 61 L.Ed.2d at 183. See also, 20 C.F.R. § 404.510a.

Mr. Exner's testimony, if believed, also shows that he was under severe mental and emotional stress at the time the overpayment was made. His son, Anthony, suffered from cerebral palsy and epilepsy which required extensive medical treatment and associated travel. Anthony's condition also strained the family budget to such an extent that there was insufficient funds to meet all necessary living expenses. On top of these facts, Mr. Exner's marriage was breaking up. In order to determine whether he was without fault, it is absolutely essential that these factors be considered and weighed. The

Secretary's final decision did not do so and, in the absence of a credibility determination, it is impossible to weigh such factors.

The district court did not conduct, and could not conduct, a de novo hearing where the district court judge could determine Mr. Exner's credibility. Where the Secretary has failed to make findings upon the crucial issue of credibility, the decision of both the district court and the Court of Appeals directly conflicts with prior decisions of this Court which justifies granting a writ of certiorari.

II. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN THE PRESENT CASE CONFLICTS WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS.

In Schwingel v. Harris, 631 F.2d 192 (2d Cir. 1980), the United States Court of Appeals for the Second Circuit held, in an SSI overpayment case, that plaintiff's credibility was important and she was entitled to a finding on the issue by an agency official who heard her testimony. 631 F.2d at 197, 198. In Schwingel, the Social Security Appeals Council had reversed a favorable decision of an ALJ, who never reached the credibility issue, and denied recovery of overpayment finding her to be not without fault. As in Schwingel, the ALJ who heard Mr. Exner's testimony in the present case made no finding at all as to credibility. If the Appeals

Council of the SSA cannot supply such a finding, a United States district court, as in the present case, should not be able to do so by merely declaring that the Secretary has determined credibility against the claimant when the Secretary's final decision contains absolutely no discussion of credibility at all.

In Viehman v. Schweiker, 679 F.2d 223 (11th Cir. 1982), the court held that where a claimant's testimony was critical in determining whether he was without fault in accepting an overpayment of disability benefits, it was necessary for the finder of fact to articulate any specific or other reasons for questioning his credibility. The decision of the United States Court of Appeals for the Fourth Circuit in the

present case directly conflicts with the decision of the United States Court of Appeals for the Eleventh Circuit in Viehman v. Schweiker.

The failure of the Secretary to make credibility findings in disability cases has caused at least two United States Courts of Appeals to hold that if the Secretary refuses to credit subjective pain testimony, he must do so explicitly and give reasons for that decision, and where he fails to do so, he has accepted that testimony as true as a matter of law. MacGregor v. Bowen, 786 F.2d 1050 (11th Cir. 1986); Varney v. Secretary of HHS, 859 F.2d 1396 (9th Cir. 1988).

Although many of the decisions of the United States Courts of Appeals which require specific findings when

challenging credibility involve testimony about pain, see, e.g., Gaimer v. Secretary of HHS, 815 F.2d 1275, 1279 (9th Cir. 1987), Petitioner cannot imagine any reason as to why credibility decisions in overpayment cases should demand less particularized findings.

The majority of United States Courts of Appeals require detailed findings on important issues in Social Security cases.[1]

---

[1] First Circuit: Small v. Califano, 565 F.2d 797 (1st Cir. 1977) (Secretary has an obligation to make full and detailed findings in support of his ultimate conclusion.)

Second Circuit: Donato v. Secretary of HHS, 721 F.2d 414 (2d Cir. 1983) (ALJ must make credibility findings when there is conflicting evidence with respect to a material issue.)

Third Circuit: Cotter v. Harris, 642 F.2d 700 (3rd Cir. 1981) (Examiner's findings should be as comprehensive and analytical as feasible.) CONTINUED ON NEXT PAGE

Only the United States Court of Appeals for the Fifth Circuit appears to allow for findings which reach a conclusion on an important issue by inference. Johnson v. Heckler, 767 F.2d 180 (5th Cir. 1985). In the present

---

Baerga v. Richardson, 500 F 2d 309 (3rd Cir. 1974)(Examiner's findings should be as comprehensive and analytical as feasible.)

Sixth Circuit: Shelman v. Heckler, 821 F.2d 316 (6th Cir. 1987)(ALJ required to set forth some basis for rejecting opinions of treating physicians.)

Seventh Circuit: Garfield v. Schweiker, 732 F.2d 605 (7th Cir. 1984)(Decision of the ALJ will be based on consideration of all relevant evidence and the reasons for his conclusions will be stated in a manner sufficient to permit an informed review.)

Eighth Circuit: Herbert v. Heckler, 783 F.2d 128 (8th Cir. 1986)(The Secretary must demonstrate that she evaluated all the evidence.)

Tenth Circuit: Huston v. Bowen, 838 F.2d 1125 (10th Cir. 1988)(Findings as to credibility should be closely and affirmatively linked to substantial evidence and not just a conclusion in disguise of findings.)

case, the findings made by the ALJ do not even inferentially reach the conclusion that Mr. Exner's testimony was not credible. Indeed, if any inference can be drawn from the ALJ's decision with regard to credibility, it would be that the ALJ found Mr. Exner to be credible. Nowhere in his discussion of the evidence does the ALJ even mention any evidence in the record from which an intention to impeach credibility might be inferred.

From the foregoing discussion, there can be no doubt that the decision of the United States Court of Appeals for the Fourth Circuit, affirming a decision by the district court that the Secretary of Health and Human Services made an adverse credibility decision in Mr. Exner's case, when the final

decision of the Secretary shows no such determination, clearly conflicts with the decisions of other United States Courts of Appeals, thus justifying the grant of a writ of certiorari.

III. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS SO FAR SANCTIONED A DEPARTURE BY A LOWER COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The United States Court of Appeals for the Fourth Circuit appears to have failed to follow its own prior case law in the present case. While the Fourth Circuit has never decided the question of credibility in an overpayment case, it has held:

> Unless the Secretary has examined all the evidence and has sufficiently explained the weight he has given to obviously probative exhibits, to say that his decision is supported by substantial evidence approaches an abdication of the

> court's "duty to scrutinize the record as a whole to determine that the conclusions reached are rational." Gordon v. Schweiker, 725 F.2d 231, 236 (4th Cir. 1984), quoting Arnold v. Secretary of HEW, 567 F.2d 258, 259 (4th Cir. 1977).

Indeed, the United States Court of Appeals for the Fourth Circuit has repeatedly reversed the Secretary for failing to make clear and explicit findings and indicate the reasons for such findings. Cook v. Heckler, 783 F.2d 1168 (4th Cir. 1986); Smith v. Heckler, 782 F.2d 1176 (4th Cir. 1986); Maxey v. Califano, 598 F.2d 874 (4th Cir. 1979); Smith v. Califano, 592 F.2d 1235 (4th Cir. 1979); Thorne v. Weinberger, 530 F.2d 580 (4th Cir. 1976). In pain cases, the United States Court of Appeals for the Fourth Circuit requires an ALJ to make credibility determinations and to refer specifically to

evidence informing the ALJ's conclusion as to credibility. Hammond v. Heckler, 765 F.2d 424, 426 (4th Cir. 1985).

The United States Court of Appeals for the Fourth Circuit has also held that prior decisions of that court are binding unless and until they are reconsidered en banc. Doe v. Charleston Area Medical Center, 529 F.2d 638, 642 (4th Cir. 1975).

The above decisions by the United States Court of Appeals for the Fourth Circuit appear to require specific findings upon all issues which may affect the outcome of a social security case. While none of them involve recoupment of overpayment, counsel for Petitioner can imagine absolutely no reason for adopting a different standard in a waiver of overpayment case. Certainly, neither

the decision by the Court of Appeals in the present case, nor the decision by the United States District Court point to any such reason.

The United States District Court in the present case held that an adverse credibility decision was made when the record clearly shows upon its face that no such adverse credibility decision was made by the Secretary of Health and Human Services. Counsel for Petitioner can find no case where this Court, or any other federal court, has ever sanctioned such a finding by United States District Court. The prior decisions of this Court, of other federal courts of appeals, and of the United States Court of Appeals for the Fourth Circuit all consistently require that the Secretary determine credibility. For a United

States district court to hold that the Secretary has made an adverse credibility determination, when the Secretary's decision not only fails to make such a determination but the facts discussed in that decision will not even permit an inference that credibility was decided against a claimant, such a departure from the usual course of judicial procedure has occurred as to justify invoking this Court's supervisory power.

Petitioner is unable to offer any explanation of why both the District Court and the Court of Appeals in the present case held that the Secretary had made an adverse credibility determination when, in fact, he had not done so. Possibly the burden placed upon the lower federal courts by increasing case-

loads may have caused this fact to be overlooked. Petitioner, however, clearly called the failure of the Secretary to make credibility findings to the attention of both the United States District Court, App. A-206-220, and the United States Court of Appeals for the Fourth Circuit, App. A-221-248.

As the population of this country advances in age, and particularly as the "baby boom" generation becomes older, this Court can expect a continuing increase in the number of Social Security cases which burden the lower federal courts. Under circumstances such as these, it is essential that credibility determinations be made by the Secretary in the first instance as required by 42 U.S.C. § 405(b) in cases where credibility is an issue. If

overburdened courts make mistakes, such as those in the present case regarding credibility findings, and such mistakes are allowed to go uncorrected on appeal, our nation will have taken a step upon a road which leads from the rule of law toward anarchy and chaos. Statutory protections, prior decisions by this Court, binding precedent, and due process of law itself become absolutely meaningless if errors, such as that made upon the issue of credibility by the district court in the present case, are not corrected.

As this Court pointed out in Schweiker v. Chilicky, 487 U.S. ___, 108 S.Ct. ____, 101 L.Ed.2d 370, 381 (1988), the Social Security Act is unusually protective of claimants. Such protection, contained in the Act, is worthless

if a case, such as the present one, is allowed to slip by. Petitioner, in the present case, has no Bivens action available to him, Schweiker v. Chilicky, supra, for denial of due process of law. The grant of the writ of certiorari in the present case is his last hope for the correction of an error made by the district court which is clear upon the face of the record.

IV. THERE IS A DIRECT CONFLICT BETWEEN THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN THE PRESENT CASE UPON THE ISSUE OF THE LEGAL STANDARD TO DETERMINE DEFAULT JUDGMENT AGAINST THE UNITED STATES AND A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

After the Secretary failed to comply with court scheduling orders in the present case, Petitioner moved for sanctions including entry of default and de-

fault judgment as allowed by Rule 55 of the Federal Rules of Civil Procedure. App. A-179. In ruling upon that motion, the United States District Court held:

> However, default judgment is an extreme result, and, in order to warrant default against the United States, the plaintiff must have an uncontroverted claim for relief. The court cannot say to its satisfactio on the record and evidence before the court that the plaintiff has satisfied this burden in establishing an unqualified right to default judgment. App. A-17.

The above ruling, affirmed by the United States Court of Appeals for the Fourth Circuit in the present case, directly conflicts with the decision of the United States Court of Appeals for the First Circuit in Alameda v. Secretary of HEW, 622 F.2d 1044 (1st Cir. 1980), a case very similar to the present one, which the court held the

failure to file requested legal memoranda in support of the Secretary's administrative decision amounted to a failure to otherwise defend the suit within the meaning of Rule 55(a) of the Federal Rules of Civil Procedure. According to Alameda, the limitation against default judgments contained in Rule 55(e) of the Federal Rules of Civil Procedure does not prohibit an entry of default against the United States, and does not relieve the government from its duty to defend cases and obey court orders. The court in Alameda further pointed out that the requirement that default judgments may issue against the United States only if a claimant establishes a claim or a right to relief by evidence satisfactory to the court did

not deprive the district court of authority to respond to the Secretary's failure to file legal memoranda by striking denials of the Secretary's answer and finding claimant's entitlement to the benefits based upon plaintiff's brief pointing out lack of sufficient evidence in the administrative transcript for the Secretary's conclusion. As the court said in Alameda v. Secretary of HEW, 622 F.2d at 1049:

> Should a district court finding for the claimant be appealed to us, the scope of our review would be limited by the terms of Rule 55(e). We would not easily set aside the judgment if the entry of default was justified and the claimant's district court brief and reference to the record appeared relevant, fair and reasonably comprehensive. If the brief should entirely lack these virtues or refer to evidence supporting the Secretary's decision that was

> clearly "substantial", we would have no choice but to reverse. Nonetheless, if the district court and we have been put in the predicament of flying on one wing, the flight need not be lengthy. We emphasize that our concern will not be with examining the record for sub-stantial evidence, but with assuring ourselves that the district court properly applied Rule 55(e).

The United States Court of Appeals for the Second Circuit in Marziliano v. Heckler, 728 F.2d 151 (2d Cir. 1984), has adopted the standard set forth by the First Circuit in Alameda. In Giampaoli v. Califano, 628 F.2d 1190 (9th Cir. 1980), the court appears to have affirmed what was essentially a default judgment against the Secretary for failure to otherwise defend, while calling it a judgment on the merits rather than a default judgment.

Although Wright, Miller, and Cooper, Federal Practice and Procedure, § 2702, p. 548 et seq., indicates that the preferable view is that Rule 55(e) precludes any default judgment for procedural violations against the United States, this has certainly not been the view taken by the federal courts in the above cases. This view also does not comply with the language of Rule 55(e).

The grant or denial of a motion to enter a default judgment lies within the sound discretion of the district court and will be reversed only for abusive discretion. See, e.g., Dundee Cement Co. v. Howard Pipe and Concrete Products, Inc., 722 F.2d 1319 (7th Cir. 1983). As this Court said in Albemarle Paper Co. v. Moody, 422 U.S. 405, 416,

95 S.Ct. 2362, 45 L.Ed.2d 280, 296 (1975):

> ...discretionary choices are not left to a court's "inclination" but to its judgment; and its judgment is to be guided by sound legal principles." United States v. Burr, 25 F.Cas. 30, 35 (C.C.Va. 1807)(Marshall, C.J.)

In Collins v. Seaboard Coastline Railroad, 681 F.2d 1333 (11th Cir. 1982), the court pointed out that in review and exercise of discretion under the abusive discretion standard, it is important to examine the premises upon which discretion is exercised. The court in that case further said:

> By very definition, however, an exercise of discretion could resolve the matter either way and still be affirmed, assuming the result is not beyond the permissible scope of discretion. A discretionary decision that falls within permitted bounds, but is based on false premises, raises the question on review as to whether the

> trial court would have come to the same conclusion using proper premises. That it could have does not satisfy the inquiry as to whether it would have reached the same result. The affirmance of a discretionary decision that is based on an improper view of the facts or the law merely reflects the appellate court's exercise of discretion that rightfully belongs to the trial court. The proper role of appellate review permits a remand for further proceedings when a discretionary decision has been made on false premises. 681 F.2d at 1335.

The standard used by the trial court in the present case would require a denial of default judgment whenever there is any controverted claim for relief. Whenever an answer has been filed denying any of the allegations of a complaint, the claim for relief has, at least to some extent, been controverted. Rule 55(a) of the Federal Rules of Civil Procedure makes sanctions,

including entry of default and default judgment, available not only for failure to file an answer, but also for failure to otherwise defend an action. (emphasis added). Rule 55(e) of the Federal Rules of Civil Procedure does not prohibit an entry of default and default judgment against the United States, but merely requires the existence of some evidence upon which to base the judgment.

In the present case, there can be no doubt that the Secretary failed to comply with court scheduling orders, and otherwise delayed this case. Plaintiff did not seek default judgment prior to the filing of an answer because, without the administrative record, there would be no evidence properly before the Court upon which the Court could determine

this matter as required by Rule 55(e) of the Federal Rules of Civil Procedure and 42 U.S.C. § 405(g). Poe v. Mathews, 572 F.2d 137 (6th Cir. 1978).

By utilizing a standard which requires an uncontroverted claim for relief, the district court in the present case has made it impossible for a plaintiff to ever obtain a default judgment against the United States once an answer has been filed, no matter how egregious a subsequent failure to "otherwise defend" may be. Such a decision makes the "otherwise defend" language of Rule 55(a) meaningless in actions against the United States government. Rule 55(e) of the Federal Rules of Civil Procedure already provides the United States with a preferred position to other litigants so far as

default judgments are concerned. Extension of that protection to prohibit the possibility of an entry of default judgment after an answer is filed, regardless of the conduct of the United States in later stages of the proceedings, is to remove from the district court a sanction which the rules contemplate that court shall have.

It is important that the district court have the sanction of default judgment available against the United States where the evidence will permit its entry and the government has "otherwise failed to defend" a case. Sanctions other than default, such as contempt, or monetary fines, may require ongoing court attention greatly increasing already overburdened federal district courts. Indeed, the expense of

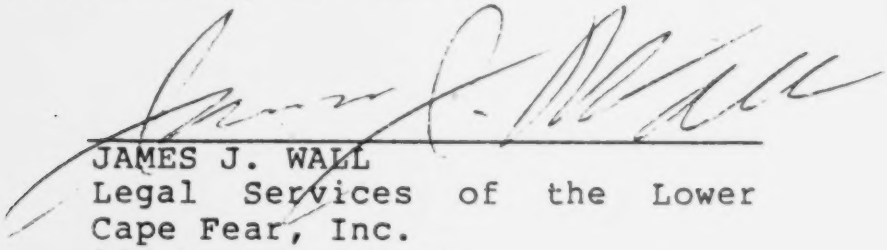
administering sanctions such as contempt, or fines, may cost the taxpayers more money than the amount in controversy would justify if default were entered. Flexibility, to the full extent allowed by the rules of civil procedure, is needed by the federal district courts under such circumstances.

The question of when a federal district court may enter a default judgment against the United States is a serious and important question of federal law which this Court has not addressed, but needs to address. Therefore, the Petition for Writ of Certiorari should be granted so that the Court may resolve this issue as well as resolve a conflict between the circuits.

CONCLUSION

For these various reasons, the petition for certiorari should be granted so that this Court may resolve the issues presented herein.

Respectfully submitted.



JAMES J. WALL
Legal Services of the Lower Cape Fear, Inc.
106 Market Street
Post Office Box 814
Wilmington, North Carolina
28402-0814
(919) 763-6207

COUNSEL FOR RECORD